RECORD AND BRIEFS

Nos. 16-285, 16-300 and 16-307

FILED
MAY 16 2017

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ERNST & YOUNG LLP, *et al.*,

Petitioners,

v.

STEPHEN MORRIS, *et al.*,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH, NINTH AND FIFTH CIRCUITS

BRIEF OF BRISTOL FARMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN DOCKET NOS. 16-285 AND 16-300 AND IN SUPPORT OF THE RESPONDENTS IN DOCKET NO. 16-307

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June 16, 2017

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Bristol Farms respectfully files this brief pursuant to Rule 37.3 in support of petitioners in *Epic Systems Corporation v. Jacob Lewis* (No. 16-285) and *Ernst & Young LLP, et al. v. Stephen Morris, et al.* (No. 16-300), and in support of respondents in *National Labor Relations Board v. Murphy Oil USA, Inc., et al.* (No. 16-307).[1]

Bristol Farms operates retail grocery stores throughout Southern California. Like many other California employers, it regularly enters into arbitration agreements with its employees to resolve any and all employment disputes which might arise. These arbitration agreements require Bristol Farms and its employees to resolve employment disputes on an individual basis. In July 2016, the National Labor Relations Board ("the Board") invalidated Bristol Farms' arbitration agreement because the Board found that it impermissibly required employees to pursue their employment-related claims on an individual, not class or collective, basis, and accordingly, was unenforceable under the National Labor Relations Act. *See Bristol Farms*, 364 N.L.R.B. No. 34 (2016).

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1. Pursuant to Rule 37.6, Bristol Farms affirms that no counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. A letter from the Solicitor General consenting to the filing of this brief, as well as letters reflecting the remaining petitioners and respondents' blanket consents to the filing of *amicus curiae* briefs, are on file with the Clerk.

Thereafter, Bristol Farms petitioned the D.C. Circuit to set aside the Board's Decision and Order, and that Petition for Review is now being held in abeyance pending this Court's decision in the instant matters. *See Bristol Farms v. NLRB*, Case No. 16-1247 (D.C. Cir.).

Bristol Farms submits this brief to raise an argument that the parties and courts below have not fully addressed and which may further assist this Court in evaluating the principal issue now before it. Further, because Bristol Farms' case before the D.C. Circuit presents the same issue as the issue to be resolved by the Court in these cases, Bristol Farms has a substantial interest in ensuring that the Court considers this additional argument before issuing its decision, as the decision may govern the outcome of Bristol Farms' matter in the D.C. Circuit.

SUMMARY OF ARGUMENT

Amicus concurs with the arguments advanced in the principal briefs of the employer parties (Petitioners Ernst & Young LLP and Epic Systems Corp., and Respondent Murphy Oil USA, Inc.) that this Court's task is to harmonize the Federal Arbitration Act and the National Labor Relations Act ("NLRA"), and that this task may be easily achieved by rejecting the construction of Section 7 of the NLRA that the National Labor Relation Board created in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *rev'd in relevant part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). *Amicus* writes separately only to address a critical question that is not squarely addressed in the decisions under review or the principal briefs: whether a request for Rule 23(b)(3)-type class relief (in a pleading, motion, *etc.*)—as opposed to initiating litigation with or

without such a request—is in itself "concerted activity" under Section 7 of the NLRA.

Seeking certification of a Rule 23(b)(3)-type class action is not a form of "concerted activity" for a very simple reason: **the modern Rule 23(b)(3)-type class action is not a claim aggregation procedure. It is a form of virtual representation.** It is not a banding-together of persons with aligned interests; it is what amounts to the appointment of a *guardian ad litem* to litigate aligned interests. It simply does not fit into the rubric of the traditional understanding of "concerted activity," and when the Board in *D.R. Horton* stretched the meaning of "concerted activity" to accommodate seeking certification of a class, it adopted an interpretation that is beyond the ambit of the Board's expertise and the plain meaning of the NLRA.[2]

ARGUMENT

Section 7 of the NLRA affords employees "the right to . . . engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Up until 1975, the Board applied a two-step analysis to Section 7. First, it "consider[ed] whether some kind of group action occurred." Second, if "group action" took place, then it

2. This Court will find little discussion of this issue in the decisions under review. The Fifth and Ninth Circuits do not discuss it at all. The Seventh Circuit in *Lewis*, briefly addresses the issue of whether seeking class certification is in itself concerted activity, but it proceeds under the unwarranted assumption that a Rule 23(b)(3)-type class action is group litigation, and does not address at all the question of whether *D.R. Horton* properly addressed Board precedent.

"consider[ed] whether that action was for the purpose of mutual aid or protection." *Meyers Industries, Inc.*, 268 N.L.R.B. 493, 494 (1984) (discussing Board precedent before 1975) ("*Meyers I*"), *enforcement denied and remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) ("*Prill I*"). *See also, e.g., Root-Carlin, Inc.*, 92 N.L.R.B. 1313, 1314 (1951) ("Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self organization.").

In 1975, in *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999 (1975), the Board abandoned its traditional two-step analysis of Section 7 by holding that "group action" will be presumed if a single employee acts with the purpose of "mutual aid or protection" and no other employee objects. *See id.* at 1000 ("Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."). "Under the *Alleluia* approach an observable manifestation of 'group will' *in the workplace* . . . was no longer required to find concert of action. . . . [I]t was the Board that determined the existence of an issue about which employees *ought* to have a group concern." *Meyers I*, 268 N.L.R.B. at 495 (emphasis in original). Over the ensuing years, *Alleluia*'s departure from Board precedent was roundly criticized in the Courts of Appeal. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1082 (8th Cir. 1977).

Nine years later, in *Meyers I*, the Board overruled *Alleluia* and restored its longstanding approach to Section 7 issues. *Meyers I*, 268 N.L.R.B. at 498 ("[W]e hold that the concept of concerted activity first enunciated in *Alleluia* does not comport with the principles inherent in Section 7 of the Act."). In *Prill I*, the D.C. Circuit remanded *Meyers I* to the Board for reconsideration. The Board affirmed its rejection of *Alleluia*, and the D.C. Circuit affirmed. *Meyers Industries, Inc.*, 281 N.L.R.B. 882, 883 (1986) ("[W]e reaffirm our recognition that the Board has a wide latitude in interpreting Section 7 of the Act . . . . [W]ithin the conceivable limits of a general phrase such as 'concerted activities,' it is surely appropriate to choose that construction that is mostly responsive to the central purposes for which the Act was created. We believe that our choice in *Meyers I* . . . does fully reflect those purposes.") ("*Meyers II*"), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Industries, Inc. v. NLRB*, 487 U.S. 1205 (1988).

The modern Rule 23(b)(3)-type class action is the very antithesis of "concerted activity," as that term is understood in *Meyers I & II*, because it is not "engaged in with or on the authority of other employees." *See Meyers I*, 268 N.L.R.B. at 497 (*quoted with approval in Meyers II*, 281 N.L.R.B. at 885). "[I]t is incorrect to equate the class action device with more traditional forms of procedural aggregation. Instead, it is necessary to recognize the modern class action as a fundamentally new and different procedural animal—a wholly original model of litigation with its own unique procedural DNA." Martin H. Redish, *Rethinking The Theory Of The Class Action: The Risks And Rewards Of Capitalistic Socialism In The Litigation Process*, 64 Emory L.J. 451, 454 (2014).

The fundamental characteristic of this "wholly original model of litigation" is that it occurs without any pre-litigation agreement, communication or meeting-of-the-minds between members of the putative class. Indeed, Professor Harry Kalven, Jr. and Maurice Rosenfield, in their very influential article *The Contemporary Function Of The Class Suit*, 8 U. Chi. L. Rev. 684 (1940-41)—widely credited as one of the main inspirations for Rule 23[3]—could not have been clearer on this point:

> "What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it. There are basically two methods for doing this. The first is to organize the various claimants prior to suit and make them all parties plaintiff to the litigation; this is committee technique. *The second is to ignore the various claimants until a decree has been obtained and then to hold open the decree and to permit them upon*

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3. The Notes of the Advisory Committee on Rules to the 1966 amendments to Rule 23 cites Kalven & Rosenfield as a source of the Committee's criticisms of previous iterations of the Rule. *See also* Richard A. Nagareda, *Class Actions In The Administrative State: Kalven And Rosenfield Revisited*, 75 U. Chi. L. Rev. 603, 603 (2008) (Kalven and Rosenfield "offered the first major analysis of the class action device in institutional terms. The Article would occupy the field for more than a decade, until the emergence of a new generation of commentary spurred by the adoption in 1966 of Rule 23 of the Federal Rules of Civil Procedure in its modern form.").

> *solicitation under court auspices to participate in the benefits of the decree. The suit in form will be brought initially by any member of the group who, unchosen and unasked and without soliciting consents from the others or organizing them prior to trial, volunteers to assert the rights of all.* ***This is the technique of the class suit.***" *Id.* at 688 (emphasis added).

But while the Rule 23(b)(3)-type class action does not fit within the *Meyers I & II* rubric for "concerted activity," it fits *Alleluia*'s rubric like a glove. There can be little doubt over the proposition that a putative class action filed by a single employee to enforce statutory rights is for "mutual aid or protection" of other employees. Under *Alleluia*, but ***not*** *Meyers I & II*, "group action" is presumed, bringing the request for class status under the protections of Section 7.

For this reason, when the Board's General Counsel in 2010 addressed the question of whether seeking class status was concerted activity *per se*, he concluded that it must not be, because the opposite conclusion entailed a resurrection of the long-rejected *Alleluia* standard:

> "Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. ***To conclude otherwise would be a return to the concept of 'constructive concerted activity' that the Board rejected*** in *Meyers Industries* (*Meyers I*), 268 N.L.R.B. 493, 495-496 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985),

> reaffirmed, *Meyers Industries* (*Meyers II*), 281 N.L.R.B. 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions 'designed for the benefit of all employees' is concerted activity 'in the absence of any evidence that fellow employees disavow such representation')." NLRB, Gen'l Counsel Memorandum No. 10-06, at p. 6 (June 16, 2010) (emphasis added).

Accordingly, when the Board, in *D.R. Horton Inc.*, held that class relief waivers in arbitration agreements violated Section 7, it necessarily was departing from *Meyers I & II*, and at least partially resurrecting *Alleluia*. ***But the Board did not acknowledge that it was doing so, let alone justify swinging the precedential pendulum backwards.*** *D.R. Horton*'s entire discussion of the issues highlighted in the last six paragraphs is limited to this brief paragraph:

> "Depending on the applicable class or collective action procedures, of course, a collective claim or class action may be filed in the name of multiple employee-plaintiffs or a single employee-plaintiff, with other class members sometimes being required to opt in or having the right to opt out of the class later. *See, e.g.*, 29 U.S.C. § 216(b); Fed. R. Civ. P. 23(c)(2)(B)(v). To be protected by Section 7, activity must be concerted, or 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.' *Meyers*

> *Industries*, 281 N.L.R.B. 882, 885 (1986), *affd. sub nom. Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). When multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she 'seek[s] to initiate or to induce or to prepare for group action.' Meyers, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D.R. Horton Inc.*, 357 N.L.R.B. at 2279.

D.R. Horton's perfunctory analysis of the issue assumes that since members have the right to exclude themselves from a certified class, then "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action . . . ." This rule is indistinguishable from *Alleluia*'s rule that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Alleluia*, 221 N.L.R.B. at 1000. By citing *Meyers II* for the rule of *Alleluia*, the Board engaged in a kind of administrative legerdemain. It left employers scratching their heads over what is the standard for concerted activity in the post-

D.R. Horton world. Is it *Meyers I & II*? *Alleluia*? Some mixture of the two? If the latter, how does the mixture work? Is it *Alleluia* for class relief waivers and *Meyers I & II* for everything? Is there a longer list of factual settings in which *Alleluia* should be applied? If so, how is that list defined? Does the Board get to choose one or the other depending on its views of the broader purposes of the Act? Or its views of sound labor policy? Or whim?

D.R. Horton does not represent sound administrative practice. It is a bedrock principle of administrative law that "[a]n agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent . . . ." *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978). *Accord, e.g., National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) ("it is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction."). The Board especially requires close supervision in this regard because it has sometimes followed a "process of ad hoc and inconsistent judgments in which the only determinative elements seems to be the composition of the NLRB panel which happens to hear the case . . . ." *Local 777*, 603 F.2d at 870. Accordingly, the Courts have rigorously applied this bedrock principle to the Board. "The Board is not at liberty to ignore its prior decisions, [*citation omitted*] but must instead provide a reasoned justification for departing from precedent . . . ." *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008). It "may not depart *sub silentio*, from its usual rules of decision to reach a different, unexplained result in a single case." *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36-37 (1st Cir. 1989). Accord,

Randell Warehouse of Arizona, Inc. v. NLRB, 252 F.3d 445, 448-49 (D.C. Cir. 2001) ("We have repeatedly told the Board that 'silent departure from precedent' will not survive judicial scrutiny.") When the Board fails to meet its obligation to confront its precedent, "its actions indicate that lack of reasoned articulation and responsibility that vitiates the deference we would otherwise show to its very considerable expertise in strictly labor matters." *Local 777*, 603 F.2d at 872. The Board flouted this principle when it departed from longstanding precedent interpreting Section 7's "concerted activities" protections for the special case of class arbitration of employment claims.

CONCLUSION

As the employer parties correctly argue in their principal briefs, deference is not due to the Board in this instance because it has no expertise in the interpretation of the FAA. Moreover, no deference is even due here to the Board's interpretation of Section 7's protection of "concerted activities," because *D.R. Horton* was a "silent departure" from longstanding Board precedent. In the absence of any deference owed to the views of the Board, this Court's task of reconciling the FAA and the NLRA is comparatively simple: the waiver of class arbitration in an otherwise-enforceable agreement to arbitrate employment-related disputes is not a violation of the Section 7 of the NLRA, and the rule of *D.R. Horton* must fall.

Respectfully submitted,

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